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YAYASAN SELANGOR v. AVIATION DEVELOPMENT CORPORATION (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
VERNON ONG LAM KIAT JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1402-07-2017]
12 JULY 2019

C ***CONTRACT:*** *Agreement – Joint venture agreement – Claim – Parties entered into joint venture agreement to develop land – Failure to fulfill condition precedent to joint venture agreement – Allegations that there were cash payments made under agreement – Claim for outstanding sum being balance sum for transfer of land – Whether losses claimed for fell within scope of agreement – Whether there were cash payments made – Whether claim substantiated – Whether losses proved – Whether* D *claim attempt to take advantage of own breach – Whether claim for losses supported by documentary evidence and testimonies of witnesses – Whether claim ought to be allowed*

The appellant and the respondent had entered into a joint venture agreement ('JVA') to develop an airpark on the appellant's land and the latter granted E the former irrevocable right to develop the land. It was agreed that the appellant would transfer the land to the respondent for the sum of RM1.8 million. The respondent paid RM507,053 and there was an outstanding balance of RM1,292,947 to be paid for the transfer of the land within a stipulated period. When a dispute arose between the parties, the appellant F commenced a suit against the respondent, seeking, *inter alia*, a declaratory order that the JVA was validly terminated as the respondent had not fulfilled the condition precedent to the JVA by failing (i) to obtain the necessary approvals from the relevant authorities; and (ii) to pay the appellant the outstanding sum of RM1,292,947 being the balance sum owed for the G transfer of the land ('liability proceedings'). The High Court allowed the liability proceedings with costs and ordered, *inter alia*, that the appellant refund to the respondent a sum of RM507,053, being the deposit and squatters compensation and the assessment of the other sums to be repaid by the appellant to the defendant pursuant to cl. 4.7 to be determined and assessed by the Registrar in accordance with the said clause ('liability H judgment'). The respondent appealed against the liability judgment but the appeal was dismissed. Leave to appeal further was denied by the Federal Court. The matter then proceeded for assessment of damages before the Deputy Registrar ('DR') ('assessment proceedings'). The DR ordered the appellant to pay the respondent the sum of RM24,872,021.10 ('assessment

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decision'). Dissatisfied, the appellant appealed against the assessment decision to the judge-in-chambers. It was the appellant's case that (i) the respondent's claim did not fall within the scope of the JVA and, in any event, it was not entitled to the same as the respondent did not obtain the necessary approvals; and (ii) the documentary evidence and the testimonies of the respondent's witnesses did not support the respondent's claim. The Judicial Commissioner allowed the appeal in part and reduced the amount payable to RM24,202,141, being the amount paid and outstanding/owing to (i) the consultant ('DW1') for the sum of RM1,170,000; (ii) Syarikat Berjaya Services ('Berjaya Services'), which was appointed by the respondent to carry out landscaping and cleaning works, for the sum of RM1,772,000; (iii) MSH Architects for the sum for RM420,000; and (iv) Aziebina Sdn Bhd ('Aziebina'), a contractor, for the sum of RM20,840,141. Hence, the present appeals by (i) the appellant against the whole decision; and (ii) the respondent against the reduction of the claim. The issues that arose for adjudication were (i) whether the loss claimed and allowed by the High Court fell within the scope of cl. 4.7 of the JVA; and (ii) whether, in the event the respondent was entitled to the claim, the respondent had proved the loss as claimed.

Held (allowing appellant's appeal; dismissing respondent's appeal)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The respondent argued that the appellant was seeking to declare cl. 4.7 unenforceable. This contention was misconceived. There was no argument advanced by the appellant that cl. 4.7 was unenforceable. The issue was whether costs and expenses by the respondent, in relation to the development, were properly and legitimately incurred for them to come within the monies to be refunded by the appellant under cl. 4.7 of the JVA. It was also evident that the appellant gained no benefit or advantage which must be refunded within the meaning of s. 65 of the Contracts Act 1950. (paras 25 & 26)

(2) The respondent clearly commenced commercial activities on the land without obtaining the necessary approvals. In doing so, the respondent acted against the undertaking of the parties in the JVA. It must follow that part of the expenditure being claimed was not legitimately or properly incurred for the purposes of the JVA. In claiming for these monies, the respondent was seeking to take advantage of its own breach. The respondent was not entitled to compensation from the appellant, under cl. 4.7 of the JVA as they had not knowingly carried out work not in accordance with the JVA and they could not, therefore, benefit from their own breach. This may not apply to all the heads of claim. (paras 27 & 30)

(3) In order to undertake the project, the respondent would have had to appoint consultants such as airfield development consultants, architects, civil engineers, land surveyors and others. The expenses for such consultants was envisaged under the JVA. The consulting agreement was executed between the respondent and the consultant ('DW1'). However, there was no plausible evidence that the cash payments were made by the respondent to DW1. The JC clearly failed to appreciate the evidence or, rather, the lack of evidence in proving the damages. Where a specific loss had been asserted, it must be strictly proved. In the case of the claim of payments made to DW1, the High Court was plainly wrong to have allowed the claim as it was not proved as required by law. (paras 34 & 42)

(4) A total of four agreements were entered between Berjaya Services and the respondent between 2007 and 2013. The extent of the services provided by Berjaya Services involved cleaning and cutting the grass around the clubhouse. The four agreements provided for a monthly fee ranging from RM16,500 to RM23,000. Apart from the service agreements, there was no other documentary evidence to show the cash payment. The service agreements were one-page agreements with no breakdown as to the services to be provided. There was no documentary evidence to substantiate the cash payments. DW2 claimed that he had to be paid in cash as he was to pay his workers but he kept no records of such payments. DW2's admission only substantiated the appellant's argument that no cash payments were made in the first place by the respondent. This claim was not proved. (paras 43-45)

(5) DW3 was appointed in his personal capacity as an architectural project consultant. Later, DW3's appointment was formalised *via* the appointment of MSH Architects by the respondent where DW3 was a partner. It was claimed that a sum of RM500,000 was paid by the respondent to DW3 in his personal capacity and then in his capacity as a partner to MSH Architects. There was a further sum of RM270,000 that was still due and owing to MSH Architects. However, when questioned about whether the cash amounts were ever deposited in any bank accounts or whether there was any record showing receipt of such cash payments, DW3 was evasive and could point only to the payment vouchers. There was no documentary evidence of the particulars of work performed by DW3. There was no basis for the respondent's claim as it failed to prove the fact of actual loss. The High Court, although allowing only part of the claim, was plainly wrong in allowing any part of the claim. (paras 46 & 48)

(6) There was evidence that Aziebina was appointed by the respondent as the main contractor. However, assessing the claim revealed some serious infirmities. The only documentary evidence was the affidavit of the deceased Chief Executive Officer of Aziebina and sales receipts. The affidavit only confirmed receipt of payment without more. What appeared to have been overlooked or given little credence was the evidence of the valuer and the valuation report. The valuation report noted that part of the site was leveled, improved with an airstrip and built with hangars and temporary buildings cum chalets which were currently not in use. Evidently, the amount of work done was proportionate to the value of the improvement even after taking into account any expenses for a feasibility study and topography work. The High Court made erroneous findings on the alleged loss. The findings on the loss were made without any basis or justification. Alarm bells should have been ringing when a claim in excess of RM24 million was made for the costs and expenses incurred when the land value after improvement was only about 7 million. Although there was nothing wrong in making payments in cash, serious question should have been asked when the total paid in cash was purportedly more than RM17 million. (paras 49, 51, 53, 54 & 56)

(7) It was curious to think that business people only deal in cash and that large sums of money were kept not in financial situations but elsewhere. The irresistible conclusion was that no such cash payments were received by them. These assertions of cash payments were contrived to bolster the case of loss suffered. In the end, the appellant's contention that the respondent and the third parties conspired to produce self-serving documents was not without merit and could not be dismissed lightly. The High Court was plainly wrong not to have appreciated the whole of the evidence and had come to the unfortunate conclusion that loss was proved. (para 58)

Case(s) referred to:

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***

Alghussein Establishment v. Eton College [1988] 1 WLR 587 ***(refd)***

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***

Chin Well Fasteners Co Sdn Bhd v. Sampath Kumar Vellingiri & Anor [2005] 4 CLJ 394 CA ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(dist)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

A *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA* ***(refd)***
Wasal Construction Sdn Bhd v. Boh Huat Chan Timber Products Sdn Bhd [2013] 1 LNS 1269 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 65

B *For the appellant - Malek Imtiaz Sarwar, Chan Wei Jun & Fahda Nur Ahmad Kamar; M/s Fahda Nur & Yusmadi*
For the respondent - M Menon, James Joshua Paulraj & P Taneswaran; M/s Tanes, Khoo & Paulraj

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-791-07-
C *2014 (overruled).]*

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal JCA:

D **[1]** This appeal from the Kuala Lumpur High Court is primarily concerned with the interpretation of a clause in the contract between the plaintiff and the defendant in determining how damages are to be assessed. On 14 July 2017, the High Court had essentially dismissed the appellant's appeal against the decision of the learned Deputy Registrar ("DR") in respect
E of the assessment of damages. The High Court ordered the appellant to pay the sum of RM24,202,141.

[2] Aggrieved with this decision, the appellant filed this appeal. The respondent in turn filed a cross-appeal. After having read the written submissions as well as hearing oral arguments on the issues raised, we
F indicated to the parties that we would deliver our decision on a date to be informed. Having given the appeal our utmost consideration, this is now our decision which shall constitute the judgment of the court.

The Factual Background

G **[3]** The background facts can be stated as follows. The appellant and respondent were previously parties to a joint venture agreement dated 8 August 2007 (the "JVA") for the purposes of jointly developing an airpark on the appellant's land, HS(D) 40850 PT 2924, Mukim Ulu Bernam, Daerah Ulu Selangor ("the said land"). The respondent was also granted the
H irrevocable right to develop the said land upon the terms and conditions of the JVA.

[4] It was also agreed that the appellant shall transfer the said land to the respondent for the sum of RM1.8 million. The respondent had already paid the sum of RM507,053 and there was an outstanding balance of
I RM1,292,947 which was to be paid for the transfer of the said land within the stipulated period.

[5] Subsequently, a dispute arose between the parties. The appellant instituted Kuala Lumpur High Court Civil Suit No. 22NCVC-791-07-2012 (the "liability proceedings") and sought for, *inter alia*, a declaratory order that the JVA was validly terminated as the respondent had not fulfilled the condition precedents of the JVA, namely, it failed to obtain the necessary approvals from the relevant authorities and it also failed to pay to the appellant the outstanding sum of RM1,292,947 being the balance sum owed for the transfer of the said land.

[6] Ultimately, on 29 April 2013, the High Court allowed the appellant's claim in the liability proceedings with costs and ordered, amongst others: (the "liability judgment"):

> That the Plaintiff refund to the Defendant a sum of RM507,053.00 being the Deposit and Squatters Compensation, and the assessment of the other sums to be repaid by the Plaintiff to the Defendant pursuant to Clause 4.7 be determined and assessed by the Registrar in accordance with the said clause.

[7] The respondent appealed against the liability judgment. The appeal was dismissed with costs on 2 April 2014 by this court. Leave to appeal further was denied by the Federal Court. The matter then proceeded for assessment of damages before the learned DR which was heard over two days on 29 November 2016 and 10 January 2017 (the "assessment proceedings"). The basis of the respondent's purported loss was cl. 4.7 of the JVA which provided:

> Upon the occurrence of any of those events set out in Clause 4.6 herein, either Party shall be entitled by notice in writing to the other Party, to rescind this Agreement, and in such an event ADC shall be entitled to terminate this Agreement and *YS shall refund the Pre-Development Operational Costs (which includes the Deposit and the Squatters Compensation), all other monies paid to YS or any other parties and all costs and expenses which have been made by ADC in relation to the Development,* and thereafter, this agreement shall cease to have any effect and neither party shall have any claim against each other on any matters arising from or relating to this agreement save and except for any antecedent breach and this Clause 4.7.
>
> (emphasis added)

The Assessment Proceedings

[8] The assessment was conducted by the learned DR on the basis of testimony and expert opinion. The appellant relied on the testimony of one witness who was a registered valuer from Raine & Horne International Zaki & Partners. She was instructed to determine the market value of the said land on an "as is" basis. To this end, she prepared a valuation report dated 10 March 2015. In summary, the market value of the said land was

RM7,350,000 taking into account the land improvement value of RM70,000. It was intended to show that the amount purportedly spent by the respondent was disproportionate to the value of the land improvement.

[9] The respondent called five witnesses. It was the respondent's case that RM24,872,021.10 was in fact expended or owing to third parties for the purported development, construction and management of the said land. It therefore sought this amount as it was entitled to recover (1) all monies paid to any other parties, (2) all costs and expenses which has been made by the respondent in relation to the development of the said land and (3) all other pre-development costs (apart from the deposit and squatters' compensation which have already been refunded by the appellant).

[10] In brief, the testimony of the witnesses was as follows. DW1 was a consultant engaged by the respondent by way of a consulting agreement dated 17 September 2007 to provide "Airfield Development Consulting, Airfield Technical Advisory, Airfield Operations Manual, Aerodrome Manual and Airfield Operations" (the "consulting agreement"). It was agreed that the respondent will provide compensation of RM30,000 a month to DW1. DW1 testified that he was paid the sum of RM990,000 by the respondent and an additional sum of RM180,000 was still due and owing as outstanding payment. In total, a sum of RM1,170,000 was paid or owing to DW1.

[11] The next witness (DW2), was the Operations Manager for Syarikat Berjaya Services ("Berjaya Services"). Berjaya Services was appointed by the respondent to carry out landscaping works, as well as cleaning and maintaining the site. Berjaya Services and the respondent entered into four service agreements which were effective from 1 September 2007 until 31 August 2015. DW2 testified that the total sum of RM1,680,000 had been paid to Berjaya Services and a sum of RM92,000 was still outstanding. In total, a sum of RM1,772,000 was paid or owing to DW2.

[12] The third witness (DW3) was an architectural project consultant with MSH Architects. He was appointed by the respondent to oversee the appointment of the architect, engineers and other technical persons in relation to the construction of the airfield. The respondent purportedly paid RM500,000 and a balance of RM270,000 was allegedly still due and owing. In total, a sum of RM770,000 was paid or owing to MSH Architects.

[13] The next witness (DW4) was a director of the respondent. He testified, amongst others, that payments were made in cash to the relevant third parties and that the cash was obtained through "private friendly loans" from friends and the shareholders' funds. He also testified that a total of RM269,880.10 has been spent by the respondent on utility bills as well as the assessment costs to the Hulu Langat District Council.

[14] The final witness (DW5) was the project manager for Aziebina Sdn Bhd ("Aziebina"). On 11 September 2007, Aziebina had been appointed as a contractor to construct the "Proposed Fly-In Community Resort" on the said land. He said that Mohammad Hisyam Abdullah ("Mohammad Hisyam"), the late Chief Operating Officer of Aziebina passed away on 7 December 2016. Mohammad Hisyam had affirmed an affidavit on 2 August 2016 which purportedly confirmed that Aziebina was already paid the sum of RM14,050,000 for its services and there was a balance of RM6,790,141. The total sum for services alleged to be rendered by Aziebina was RM20,840,141.

[15] In the upshot, on 14 March 2017, the learned DR ordered the appellant to pay the respondent the sum of RM24,872,021.10 (the "assessment decision"). Dissatisfied with the assessment decision, the appellant appealed the said decision to the judge in chambers on the same day. The matter was heard before the learned Judicial Commissioner on 16 May 2017. It was the appellant's case that the respondent's claim does not fall within the scope of the JVA and in any event, it was not entitled to the same as the respondent did not obtain the necessary approvals. Further, the documentary evidence and the testimonies of the respondent's witnesses did not support the respondent's claim.

[16] The learned JC partly allowed the appeal by reversing the learned DR's decision in respect of the costs of utilities and reducing the amount claimed for services by MSH Architects. To this end, amount payable was reduced to RM24,202,141 as follows: (a) amount paid and outstanding to DW1 for the sum of RM1,170,000; (b) amount paid and outstanding to Berjaya Services for the sum of RM1,772,000; (c) amount paid and still owing to MSH Architects for the sum of RM420,000; and (d) amount paid and owed to Aziebina for the sum of RM20,840,141. The appellant is now appealing against the whole of the decision. The respondent is cross-appealing against the reduction of the claim.

The Instant Appeal

[17] Although the memorandum of appeal contains various grounds, the issues for determination in this appeal can be condensed to two main grounds. The first issue is whether the loss claimed and allowed by the High Court fell within the scope of cl. 4.7 of the JVA. The second issue is whether, in the event the respondent is entitled to the claim, the respondent had proved the loss as claimed.

[18] In relation to both these questions, we agree that given that the assessment was to be conducted by reference to cl. 4.7, it must firstly be established by the respondent that the loss being claimed was for the kind recognised under cl. 4.7. Secondly, the respondent must also prove the loss in accordance with settled principles of law.

[19] On the first issue, it was submitted by the appellant that given the contractual framework entered into by the parties, the respondent's entitlement to any development costs had to be for costs legitimately and properly incurred for the purposes of the JVA. In this context, it was argued that the respondent had commenced commercial activities on the said land without obtaining the necessary approvals from the relevant authorities. As such, by claiming the loss for these activities, the respondent, it was claimed, was seeking to take advantage of its own wrongdoing.

[20] Given the position taken by the appellant, it is essential to consider the contractual obligations of the parties in the JVA. In this respect, we noted the relevant parts of the following provisions:

Clause 4.1.2 on "Approved Plans for the Aviation Services":

> ADC shall prepare and submit for the approval of the Appropriate Authorities of the layout plans and building plans for the Aviation Services.

Clause 4.1.4 on "Other Approvals":

> ADC shall prepare and submit for other requisite approvals ("Other Approvals") from such relevant authorities as are required for the execution of this Agreement and the implementation of the Aviation Services and carrying out the matters contained herein;

Clauses 6.3.1 and 6.3.2 on "Obligations of ADO":

> ADC hereby undertakes and covenants with YS that in carrying out the Development ADC shall:
>
> …
>
> observe and comply with all relevant laws, regulations, statutes and by-laws for the time being in force affecting the Development or construction to be carried out on the Said Land and
>
> ensure that all statutory orders and regulations made under or deriving validity from and any requirements and codes of practices of the Appropriate Authority affecting the Development or the Said Land are complied with

Clauses 6.4.3 and 6.4.4:

> In addition and not in derogation of those provisions set out in Clause 6.2 above, ADC shall use its best endeavours to procure that:

> the Approved Plans for each different types of development (and any variation thereto) and the requisite consents under the Development are complied with;
>
> all statutory orders and regulations made under or deriving validity from and any requirements and codes of practices of the Appropriate Authorities affecting the Development and/or the Said Land are complied with;

[21] In the liability proceedings, the High Court had also found that the respondent had failed to fulfil cls. 4.1.2 and 4.1.4 of the JVA which required the respondent to obtain approvals for the layout and building plans from the relevant authorities for the purpose of executing the JVA. This is noted in para. [15] of the judgment as follows:

> [15] Now, it is not in dispute that the defendant has taken vacant possession of the said Land. This is in accordance with clause 11 of the JV Agreement. However clause 11 states that the vacant possession granted to the defendant was for the purposes of allowing the defendant or its servant or contractors to prepare the Lay-Out and building plans only for the intended Aviation Services and for preliminary earthworks. But it is in evidence that the defendant had already commenced commercial activities on the said Land by building the airstrip, clubhouse and other buildings. The evidence of PW4 confirmed that no application for Kebenaran Merancang has ever been submitted to the Majlis Daerah Hulu Selangor for the development on the said Land. There is also dispute as to whether the Lay-Out plan has been submitted for approval by the relevant authorities. Even if I am to accept the defendant's averment that the Lay-Out plan has been prepared, I still find that the defendant has not shown that there was submission for approval of the Lay-Out plan to the relevant authorities. It is the submission for approval of the authorities that is important. Not the preparation of the Lay-Out plan.

[22] And later on in the judgment, the learned judge ruled:

> [28] It is therefore my finding that the plaintiff's rescission of the JV Agreement is valid and was in accordance with clause 4.7 of the JV Agreement. What follows is that the plaintiff is required to refund to the defendant the monies that it is entitled to under the said clause.

[23] Based on the wording of cl. 4.7, it is evident that it includes both pre-development operational costs and "costs and expenses which have been made by ADC in relation to the development". It is not disputed that the pre-development operational costs were intended to apply to expenses made prior to the execution of the JVA and it has been limited by Annexure B which stipulated in specific terms the estimated capital cost. It is common ground that the land deposit and the compensation to squatters as set out in Annexure B has been refunded to the respondent.

[24] So, the costs and expenses made by the respondent in relation to the development as envisaged by cl. 4.7 must mean the development costs which are particularised in cl. 7 and which were meant to be solely incurred by the respondent. As noted earlier, the respondent had covenanted to comply with the conditions precedent as set out in cls. 4.1.2 and 4.1.4 and also to comply with all the relevant laws and regulations affecting the development as agreed in cls. 6.3.1 and 6.3.2. So, in essence, the appellant has made a compelling argument that the respondent was seeking for costs which were not legitimately and properly incurred for the purposes of the JVA.

[25] Now, the respondent argues in turn that the appellant was essentially seeking to declare that cl. 4.7 was unenforceable. In other words, it was contended that this court was asked to review its own decision. It was contended that the appellant was estopped from raising this issue. Citing the Federal Court case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 ("*Dream Property*") and s. 65 of the Contracts Act 1950, it was submitted that the party rescinding the contract must refund any benefit or advantage gained accordingly which was in line with cl. 4.7 of the JVA.

[26] With respect, these contentions by the respondent are misconceived. There was no argument advanced by the appellant that cl. 4.7 is unenforceable. The issue is whether costs and expenses by the respondent in relation to the development were properly and legitimately incurred for them to come within the monies to be refunded by the appellant under cl. 4.7 of the JVA. It is also evident that the appellant had gained no benefit or advantage which must be refunded within the meaning of s. 65 of the Contracts Act 1950. The case of *Dream Property*, therefore, offers no assistance to the respondent.

[27] In our considered view, the respondent had clearly commenced commercial activities on the said land without obtaining the necessary approvals. In doing so, the respondent had acted against the undertaking of the parties in the JVA. It must follow that part of the expenditure being claimed was not legitimately or properly incurred for the purposes of the JVA. In claiming for those monies, it appears to us that the respondent was seeking to take advantage of its own breach. We also note that no advantage or benefit was obtained by the appellant.

[28] In this respect, the law journals are replete with cases which establish that a contracting party will not in the normal circumstances be entitled to take advantage of its own breach as against the other party (see, for example, *Alghussein Establishment v. Eton College* [1988] 1 WLR 587; *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697; *Chin*

Well Fasteners Co Sdn Bhd v. Sampath Kumar Vellingiri & Ors [2005] 4 CLJ 394; [2006] 1 MLJ 117 and *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102).

[29] A similar issue arose for the decision of this court in *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577. In that case, the issue was whether the respondent ought to be compensated for the loss of a warehouse which had been constructed on the subject property despite the absence of any planning permission. The High Court had awarded the respondent RM440,000 as compensation for a warehouse that was built illegally. In allowing the appeal, Gopal Sri Ram JCA (as he then was) observed that:

> ... there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach.

[30] In the upshot, it is our judgment that the respondent is not entitled to compensation from the appellant under cl. 4.7 of the JVA as they had knowingly carried out work not in accordance with the JVA and they cannot therefore benefit from their own breach. We must hasten to add that this may not apply to all the heads of claim. We will have to deal with this question again when we consider the next issue of whether the respondent has proved its loss.

[31] We now come to the next issue of whether the respondent had proved its loss pursuant to cl. 4.7. It cannot be disputed that the loss envisaged is one that has occurred so that it is possible to prove the loss with precision. This loss is actually akin to special damages and so must be proved strictly.

[32] The law with regard to proof of special damages is not controversial. It is trite that a party seeking damages has the burden of proving both the fact and the amount of damages. If neither is proved, damages cannot be awarded. If damage is shown but the amount is not sufficiently proved, only nominal damages will be awarded. It is also trite that where precise evidence is available, the party seeking damages must provide it to show the actual loss. In other words, the best evidence available must be produced. The evidence produced must therefore be reliable and accurate so that the loss can be quantified with reasonable precision and certainty (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232; [2011] 5 MLJ 1; *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229 and *Wasal Construction Sdn Bhd v. Boh Huat Chan Timber Products Sdn Bhd* [2013] 1 LNS 1269; [2014] 4 MLJ 294).

[33] The appellant contends that the High Court had erred in concluding that the respondent had proved its claim for damages. In order to determine if this was indeed the case, it is necessary to consider the case for each head of claim.

Airfield Development Consultancy

[34] It cannot be denied that in order to undertake the project, the respondent would have had to appoint consultants such as airfield development consultants, architects, civil engineers, land surveyors and others. The expenses for such consultants are envisaged under the JVA. The first head of claim is in respect of the airfield development consultancy which was reflected in a consulting agreement dated 17 September 2007 which was executed between the respondent and DW1. DW1 was an individual who was said to have vast experience in the aviation industry and his expertise was essential to the development and operation of the airpark by the respondent.

[35] In this respect, DW1 was paid a sum of RM30,000 per month pursuant to the consulting agreement. Up until September 2010, DW1 was paid a total of RM990,000 by the respondent for services provided which payment was acknowledged by the respondent. It also turned out that a sum of RM180,000 was still outstanding for services rendered. The High Court had accordingly found that the total sum of RM1,170,000 had been proved.

[36] Now, this finding was assailed by the appellant. It was contended that DW1 did not issue any invoices or receipts to the respondent. He also did not provide any details of the services he said he provided and did not provide any evidence of having received the monies. All payments were made in cash only without any documentary evidence of any transaction in any bank account. No audited accounts were produced and the consulting agreement itself was not stamped.

[37] In reply, the respondent contended that there was no obligation for DW1 to issue any receipts as the acknowledgment in the payment vouchers was satisfactory proof for the payment received. It was also submitted that nothing sinister should be imported in making all the payments in cash.

[38] Nevertheless, considering the oral evidence at the assessment hearing, there certainly appeared to us no explanation as to the services provided and no satisfactory evidence as to the fact of receiving the monies from the respondent. In cross-examination, DW1 was unable to provide details as to what services were provided. He only said that the scope of work was in the agreement. In the end, DW1 agreed that there were no documents which showed the services provided. There was only the agreement and no other documents or invoices. His response to no invoices being issued was that he was not a company which seemed to us to be a rather feeble response.

[39] In relation to payments made in cash, DW1 was asked as to where he deposited the cash payments. His response was that he had used the payments received and he also paid other consultants. When pointedly asked whether there was actually any evidence that cash was given to him, he could only point to the payment vouchers. Even then, he admitted that the payment vouchers were not prepared immediately but were done six or eight months later.

[40] As to how and why cash payments were made to DW1, it is most relevant also to look at the evidence given on behalf of the respondent. DW4, who was the director of the respondent, told the court that the project was undertaken privately by friendly loans from friends, shareholder funds by the three main shareholders which was led by a member of the Selangor royal family, an accomplished Singapore banker and an experienced businessman from the general aviation industry. However, DW4 was unable to produce a single document to show that these people had provided the funds.

[41] Despite the large amount of monies said to have been paid out by the respondent to the tune of over RM17 million in cash, DW4 was unable to produce any accounts of the respondent company. It came out later in evidence that a sum of RM17,294,686.80 was paid out in cash by the respondent. Notably, the respondent had failed to show any of these cash payments in the accounts of the respondent company. It was most unusual for a company not to have any record of both receiving and paying out such large sums of money. When asked for an explanation, DW4 gave an incoherent response.

[42] For these reasons, it appeared to us that although the consulting agreement may have been entered between DW1 and the respondent, there was no plausible evidence that the cash payments were indeed made by the respondent to DW1. The learned judge had clearly failed to appreciate the evidence or rather the lack of evidence in proving the damages. As we had noted earlier, where a specific loss has been asserted, it must be strictly proved. In the case of the claim of payments made to DW1, we find that the High Court was plainly wrong to have allowed this claim as it was not proved as required by law.

Berjaya Services

[43] This was the second head of claim which was allowed by the High Court. The sum allowed was a sum of RM1,680,000 which was said to be paid in cash by the respondent with a further sum of RM92,000 said to be still outstanding. A total of four agreements were entered between Berjaya Services and the respondent between 2007 and 2013. DW2, who gave evidence on behalf of Berjaya Services, admitted that he was the sole

proprietor of Berjaya Services which was a family business. The extent of services provided by Berjaya Services involved cleaning and cutting the grass around the clubhouse. The four agreements provided for a monthly fee ranging from RM16,500 to RM23,000.

[44] Now, apart from the service agreements, there was no other documentary evidence to show the cash payments. The service agreements were themselves one-page agreements with no breakdown as to the services that were to be provided. The statement of accounts produced referred to invoice numbers but no invoice was actually tendered during the assessment proceedings. DW2 admitted that there was no record of any work done. He also admitted that a sum of RM1,680,000 was paid to him in cash.

[45] Now, again there was no documentary evidence to substantiate the cash payments. DW2 claimed that he had to be paid in cash as he had to pay his workers. However, he kept no records of such payments. In our view, DW2's admission that there were no records of payments received and payments made only substantiated the appellant's argument that no cash payments were made in the first place by the respondent. This claim was therefore not proved. Again, the High Court was plainly wrong in allowing this claim.

MSH Architects

[46] Initially, DW3 was appointed in his personal capacity as an architectural project consultant. Later, DW3's appointment was formalised *via* the appointment of MSH Architects by the respondent whereby DW3 was a partner. It was claimed that a sum of RM500,000 was paid by the respondent to DW3 in his personal capacity and then in his capacity as partner of MSH Architects. There was a further sum of RM270,000 that was still due and owing to MSH Architects. So, the total sum claimed in this regard was RM770,000. The High Court however only allowed a sum of RM420,000 on appeal. The balance sum of RM350,000 is now the subject-matter of the cross-appeal by the respondent.

[47] Evidence was given that the sum of RM500,000 was paid over in cash. Out of this sum, a sum of RM150,000 was said to have been paid to DW3 for the appointment by DW3 of two consultants to conduct a preliminary feasibility study and report to the development of the airpark. There was another alleged cash payment of RM50,000 to a surveyor by the name of Siew. There was no documentary evidence of any of them accepting the appointment and more particularly of having received payment. They were also not called to give evidence.

[48] When questioned about whether the cash amounts were ever deposited in any bank accounts or whether there was any record showing receipt of such cash payments, DW3 was evasive and could point only to the payment vouchers. There was also no documentary evidence of the particulars of work performed by DW3. In our view, there was no basis for the respondent's claim here as it had failed to prove the fact of actual loss. The High Court, although allowing only part of the claim, was plainly wrong in allowing any part of the claim. There was therefore no merit in the cross-appeal.

Services Of Aziebina

[49] This was the largest head of claim allowed by the High Court. Significantly, this was a claim where the respondent was said to have paid RM14,050,000 in cash whereas a sum of RM6,790,141 was still outstanding making a total of RM20,840,141. There was evidence that Aziebina Sdn Bhd ("Aziebina") was appointed by the respondent as the main contractor. At all material times, one Muhammad Hisyam bin Abdullah @ Baskaran ('the deceased") was the chief executive officer of Aziebina but he had passed away before the trial. Prior to his death, he had affirmed an affidavit to confirm that the respondent had paid to Aziebina the sum of RM14,050,000 and there was still an outstanding sum of RM6,790,141. This affidavit was admitted into evidence.

[50] At the assessment hearing, DW5, a former project manager of Aziebina, confirmed that Aziebina had developed a 678m airstrip, two small hangars, some wooden chalets and a small clubhouse. As reasoned earlier, these works were carried out without approval of the relevant authorities and the claim should have been rejected on this ground alone.

[51] However, assessing this claim on the merits reveals some serious infirmities. The only documentary evidence was the affidavit of the deceased and the sales receipts. The affidavit only confirmed receipt of payment without more. In any case, since what is stated in the affidavit is not tested by cross-examination, it was incumbent upon the assessor of the loss to look for other evidence showing that the payments were indeed received.

[52] As it turned out, the only other evidence was the sales receipts of Aziebina as proof that payments were made to Aziebina. However, DW5 was unable to confirm the sales receipts as he was not involved in the sales and he was not aware of the amounts stated in the sales receipts. DW5 was also unable to explain if the entire works were completed as he left the company in 2009. When challenged, he could not produce any documents to show the progress of the project, the materials used, what was constructed. In essence, the only evidence relied upon was the sales receipts.

[53] What appears to have been overlooked or given little credence is the evidence of PW1 and the valuation report. PW1 was a registered valuer who gave evidence on the current value of the land on which the airpark was constructed *via* a valuation report. It was PW1's expert evidence that the current market value of the said land after the development was RM7,350,000 which included an improvement of the said land of only RM70,000. The valuation report noted that part of the site was levelled, improved with an airstrip and built with hangars and temporary buildings cum chalets which were currently not in use.

[54] Evidently, the amount of work done was not proportionate to the value of the improvement even after taking into account any expenses for a feasibility study and topography work. From the evidence, the real development was the 678m airstrip which was constructed without approval. The rest of the structures appeared to be simple non-permanent structures. It should have occurred to the High Court that the total claim by Aziebina of RM20,840,141 for the purported work done was totally disproportionate and even absurd.

[55] And this is even before the troubling issue of substantial payments purportedly made in cash of RM14,050,000 from the period 9 October 2007 until 13 February 2009 are considered. So clearly, there is more than a serious doubt as to whether the alleged cash payments were indeed made. Again we find that the High Court had failed to take into account all the evidence and was therefore plainly wrong in holding that the loss here had been proved.

[56] In the final analysis, we find that the High Court had made erroneous findings on the alleged loss. With respect, the findings on the loss were made without any basis or justification. Alarm bells should have been ringing when a claim in excess of RM24 million was made for the costs and expenses incurred when the land value after improvement was only about 7 million. Although there is nothing wrong in making payments in cash, serious questions should have been asked when the total paid in cash was purportedly more than RM17 million.

[57] With respect, the High Court did not properly appreciate how the respondent could come up with this money in the first place before it could pay others. No bank accounts were shown and no statement of accounts was produced to show where the money came from. When there was a strong challenge that no cash payments were made and the assertions of payment were fictitious, it was incumbent upon the respondent to clearly establish the source of funds. The respondent chose not to do so. We are therefore compelled to conclude that they could not do so because no such funds were provided.

[58] This also explains why the so-called recipients of the cash payments could not substantiate with any precision as to where the cash payments went. It is curious in the least to think that business people only deal in cash and that large sums of money are kept not in financial institutions but elsewhere. The irresistible conclusion is that no such cash payments were received by them. To our minds, these assertions of cash payments were contrived to bolster the case of loss suffered. In the end, the appellant's contention that the respondent and the third parties have conspired to produce self-serving documents is not without merit and cannot be dismissed lightly. In the premises, the High Court was plainly wrong not to have appreciated the whole of the evidence and had come to the unfortunate conclusion that loss was proved.

Conclusion

[59] In the circumstances, and for the reasons stated, we are constrained to allow the appeal by the appellant and dismiss the respondent's cross-appeal. The decision of the High Court was plainly wrong such that appellate intervention is warranted. The order of the High Court dated 14 July 2017 and the order of the Deputy Registrar dated 14 March 2017 are accordingly set aside. The respondent is to pay costs of RM30,000 to the appellant as costs here and below subject to allocator. Deposit, if any, to be refunded.